IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 334 OF 2006

Smt. Fatimabi Hari Ramzan
(since deceased, by her L.Rs.)
Abdul Aziz Mohammed Ramzan & ors. ... Petitioners

V/s

Shri Mohammad Yasin Abdul Aziz ... Respondent

Mr. R.S. Apte with Ashutosh Gole for the petitioners.

Mr. P.S. Dani for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 27TH MARCH, 2006

P.C.:

1. Heard learned counsel for both parties. Perused the record.

2. This petition is aimed against the judgment and order passed by the Ad-hoc Addl. District Judge, Pune, dated 30.9.2005 allowing the revision of the present respondent and setting aside the order passed by the Small Causes Judge, Pune, dated 19.7.2005 on Exh.82 in Misc. application No. 78 of 2003.

3. The present respondent No.1 preferred revision application with submission that the applicant was claiming that the order passed by the Addl. Small Causes Judge, Pune, in Misc. Application No. 78 of 2003 on Exh.82, dated 19.7.2005 was bad in law and the Trial Court had passed the said order without jurisdiction vested in it. It was further claimed by the present respondent that the Trial Court failed to appreciate the basic principles involved in the proceedings and not interpreted the mandatory provision of Sec.17 of the Provincial Small Causes Courts Act with its proper spirit.

4. After hearing both sides and perusing the record involved in the dispute, the lower appellate Court came to the conclusion that the revision application was maintainable and the Trial Court had passed the impugned order without exercising the jurisdiction and therefore the order passed in Misc. Application No. 78 of 2003 on Exh.82 was bad in law and, therefore, liable to be dismissed. Hence the present petition.

5. At the outset, it may be noted that the learned lower appellate Court Judge has rightly relied upon the Supreme Court ruling in the case of **Kedarnath v/s Mohan**

Lal Kesarwari & ors., reported in AIR 2002 SC 582, the ratio of which is thus -

> "A bare reading of Sec.17(1), Proviso shows that the legislature have chosen to couch the language of the proviso in a mandatory form and there is no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the Court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the Court in its discretion subject to a previous application by the applicant seeking direction of the Court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. It may be filed at any time upto the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous

> application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The delay on the part of the Court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the Court."

6. The learned counsel for the petitioners sought to put reliance upon the judgment of the Single Judge of this Court in the case of **Akbarali Husenali Gulamreza v/s Hotel Rezaliya Private Ltd., reported in 2002 (4) Bom.C.R. 329.** I have perused the said ruling. It is obvious that it is not applicable to the present case especially in the light of the fact that the judgment in the case of **Kedarnath** (Supra) has come subsequent to the judgment of this Court given by the Single Judge and, therefore, the ratio laid down by the same Court shall undoubtedly prevail. Moreover, it is also applicable to the present set of facts as the deposit of the amount was subsequent to the filing of the miscellaneous application and, therefore, the lower appellate Court has rightly held that the lower Court had acted ultra-vires to its jurisdiction as contemplated under

Sec.17 of the Privincial Small Causes Courts Act.

7. I do not see any perversity or irregularity in the order passed by the Ad-hoc Addl. District Judge and in the result, the petition stands dismissed with no order as to costs.

7. At this stage, the learned counsel for the petitioner sought extension of interim relief which was granted in the nature of maintenance of status-quo in order to seek direction that no third party interest should be created by the respondent. In view of the facts and circumstances, the respondent shall not create any third party interest in the suit premises for the period of six weeks or part with possession.

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